

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

REGINA C. HONEY, individually and as natural
parent of ADDISON M. HONEY, a minor, and
LUCAS R. HONEY, a minor, *et al.*,

Plaintiffs,

vs.

DIGNITY HEALTH, a California nonprofit
corporation, doing business as ST. ROSE
DOMINICAN HOSPITAL – SIENA CAMPUS,
et al.,

Defendants.

Case No. 2:12-cv-00416-LRH-GWF

ORDER

This matter is before the Court on Defendant Dignity Health's Motion for Dismissal and Monetary Sanctions (#72), filed on July 3, 2013. Co-Defendant Payflex Systems, USA, Inc. filed a Joinder to the Motion to Dismiss (#74) on July 8, 2013. Plaintiffs filed their Response to Dignity Health's Motion for Dismissal and Monetary Sanctions and Payflex's Joinder (#77) on July 31, 2013. Dignity Health filed its Reply (#79) on August 12, 2013.¹

This motion relates to an ongoing dispute between the parties regarding the scheduling of the Plaintiffs' depositions. After the motion was filed, Plaintiffs appeared for their depositions on July 10 and 11, 2013. Although a party's compliance with a discovery request after a motion to compel or for sanctions has been filed does not excuse non-compliance with the discovery rules

¹ Because Defendant entitled its motion as a "Motion for Dismissal," the motion was treated by the clerk's office as a dispositive motion for decision by the District Judge. The motion therefore did not appear on the undersigned magistrate judge's CM-ECF motions report which would have directed his attention to this matter. The motion was not referred to the undersigned until December 10, 2013. Counsel for the parties are encouraged to file motions brought pursuant to Rule 37 of the Federal Rules of Civil Procedure as "motions for sanctions."

1 prior to the motion, the Court concludes under the facts of this case that an award of sanctions is
2 not warranted.

3 Defendant seeks an award of sanctions pursuant to Rule 37(d) of the Federal Rules of Civil
4 Procedure which provides that the court may, on motion, order sanctions if a party fails, after being
5 served with proper notice, to appear for that party's deposition. In *Koninklike Philips Electronics*
6 *N.V. v. KXD Technology, Inc.*, 2007 WL 3101248, at *18 (D.Nev. 2007), this court stated:

7 The Ninth Circuit has strictly construed the language of Rule 37(d).
8 See *Estrada v. Rowland*, 69 F. 3d 405, 406 (9th Cir. 1995) (holding
9 that a party who physically appeared but refused to answer questions
10 at deposition was not subject to Rule 37(d) sanctions because the rule
11 applies only when a deponent literally fails to show up for a
12 deposition session). In *Gee v. City of Chicago Public Schools*, 2002
13 WL 1559704 (N.D.Ill.2002), a *pro se* plaintiff refused to appear for a
14 deposition. Although Defendant agreed to postpone the deposition to
15 give plaintiff more time to determine its propriety, plaintiff stated
16 that she would not appear at any time. Notwithstanding the plaintiff's
17 expressed intent not to appear for a deposition at any time, the court
18 held that plaintiff was not subject to Rule 37(d) sanctions for failing
19 to appear at a deposition that did not actually go forward. The court,
20 instead, ordered plaintiff to appear for deposition and cautioned her
21 that she would be subject to sanctions, including dismissal of her
22 action, if she failed to appear. In *In re Air Crash at Taipei Taiwan*,
23 2002 WL 32155477 (C.D.Cal.2002), the plaintiff moved for Rule
24 37(d) sanctions against an officer of the defendant who allegedly
25 failed to appear for his deposition. The scheduled deposition did not
26 take place on the date noticed, however, and the court found that
27 there was an informal agreement that the deposition would not
28 proceed while the defendant pursued legal remedies to overturn the
court's order that the deponent appear for his deposition. Relying on
Estrada v. Rowland and *Gee, supra*, the court held that plaintiff had
failed to demonstrate that the witness actually failed to appear before
the officer who was to take his deposition and that sanctions under
Rule 37(d) were not proper.

21 Although Defendant noticed the Plaintiffs' depositions on several occasions, those
22 deposition dates were cancelled or postponed either by the Defendant's counsel, by Plaintiffs'
23 counsel or by Plaintiffs. It does not appear that either Plaintiff actually failed to appear at a noticed
24 deposition and that Defendants' counsel proceeded with the deposition and made a record of their
25 nonappearance. An award of sanctions pursuant to Rule 37(d) is therefore not available. The
26 Court further finds that the delay occasioned by Plaintiffs' alleged conduct in delaying the taking
27 of their depositions does not rise to the level of prejudice that would justify the imposition of the
28 severe sanction of dismissal. Accordingly,

1 **IT IS HEREBY ORDERED** that Defendant Dignity Health's Motion for Dismissal and
2 Monetary Sanctions (#72) and Defendant Payflex's Joinder to the Motion to Dismiss (#74) are
3 **denied.**

4 DATED this 18th day of December, 2013.

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8 GEORGE FOLEY, JR.
9 United States Magistrate Judge
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